

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

UNITED STATES OF AMERICA

Plaintiff,

v.

DEVAL HATCHER,

Defendant.

Case No. 2:23-cr-00012-NJK

**Order**

[Docket No. 22]

Pending before the Court is Defendant's motion to dismiss for violation of separation of powers. Docket No. 22. The United States filed a response, Docket No. 27, and Defendant filed a reply, Docket No. 28. For the reasons more fully discussed below, Defendant's motion is **DENIED**.

**I. BACKGROUND**

Defendant is charged with operating a vehicle in excess of the posted speed limit in Red Rock National Conservation Area on September 2, 2022, in violation of 43 C.F.R. § 83651.1-3(a).<sup>1</sup>

<sup>2</sup> Docket No. 1 at 1. 43 C.F.R. § 83651.1-3(a) was promulgated by the Secretary of the Interior pursuant to authority delegated to her under 43 U.S.C. § 1733(a).<sup>3</sup>

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<sup>1</sup> Defendant was originally charged with resisting issuance of a citation in violation of 43 C.F.R. § 8365.1-4(a)(4) and exceeding posted speed in violation of 43 C.F.R. § 83651.1-3(a). Docket No. 7 at 2. The United States dismissed the charge of resisting issuance of a citation. *See* Docket No. 4-1. The criminal information in this case only charges Defendant with violating 43 C.F.R. § 83651.1-3(a). *See* Docket No. 1.

<sup>2</sup> 43 C.F.R. § 83651.1-3(a) provides that "[w]hen operating a vehicle on the public lands, no person shall exceed posted speed limits, willfully endanger persons or property, or act in a reckless, careless or negligent manner."

<sup>3</sup> 43 U.S.C. § 1733(a) provides, in part, that "[t]he Secretary [of the Interior] shall issue regulations necessary to implement the provisions of this Act with respect to the management, use, and protection of the public lands, including the property located thereon. Any person who knowingly and willfully violates any such regulation which is lawfully issued pursuant to this Act shall be fined no more than \$1,000 or imprisoned no more than twelve months, or both."

1 Defendant previously moved to dismiss the criminal information on the grounds that the  
2 charging regulation violated the nondelegation doctrine. Docket No. 12. The Court denied that  
3 motion but allowed Defendant to refile his separation of powers challenge. Docket No. 17.

4 Defendant submits that the criminal information against him should be dismissed because  
5 the regulation under which he is charged was promulgated pursuant to a “scheme [that] violates  
6 separation of powers because it unlawfully accedes legislative power in the executive branch.”  
7 Docket No. 22 at 2. The United States responds that “Congress’ delegation of authority to  
8 promulgate criminal offenses does not violate separation of powers” because the instant regulation  
9 complies with the requirements from the case law. Docket No. 27 at 3-9.

## 10 **II. DISCUSSION**

11 “The Constitution sought to divide the delegated powers of the new federal government  
12 into three defined categories, legislative, executive and judicial, to assure, as nearly as possible,  
13 that each Branch of government would confine itself to its assigned responsibility.” *I.N.S. v.*  
14 *Chadha*, 462 U.S. 919, 951 (1983). It is this “principle of separation of powers that underlies our  
15 tripartite system of Government.” *Mistretta v. United States*, 488 U.S. 361, 371 (1989). However,  
16 although the “Constitution mandates that each of the three general departments of government  
17 must remain entirely free from the control or coercive influence, direct or indirect, of either of the  
18 others, the Framers did not require – and indeed rejected – the notion that the three Branches must  
19 be entirely separate and distinct.” *Id.* at 380 (internal citations and quotations omitted).

20 Courts evaluating whether a statute violates the separation of powers must remain  
21 cognizant of the “hydraulic pressure inherent within each of the separate Branches to exceed the  
22 outer limits of its power.” *Buckley v. Valeo*, 424 U.S. 1, 122 (1976). The Supreme Court has  
23 “described the separation-of-powers inquiry as focusing on the extent to which a provision of law  
24 prevents [the intruded upon Branch] from accomplishing its constitutionally assigned functions.”  
25 *Mistretta*, 488 U.S. at 383 (quoting *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 443 (1977)).  
26 When a court “is asked to invalidate a statutory provision that has been approved by both Houses  
27 of the Congress and signed by the President, ... it should only do so for the most compelling  
28 constitutional reasons.” *Id.* at 384 (quoting *Bowsher v. Synar*, 478 U.S. 714, 736 (1986)).

1 As Defendant notes, “only the people’s elected representatives in the legislatures are  
2 authorized to make an act a crime.” Docket No. 22 at 5 (quoting *United States v. Davis*, 139 S.  
3 Ct. 2319, 2325 (2019)). Defendant submits that 43 U.S.C. § 1733(a) violates this principle because  
4 it allows the Executive Branch to define what conduct triggers criminal penalties. *Id.* at 5-9. It  
5 has long been recognized, however, that “when Congress had legislated and indicated its will, it  
6 could give to those who were to act under such general provisions power to fill up the details by  
7 the establishment of administrative rules and regulations, the violation of which could be punished  
8 by fine or imprisonment fixed by Congress.” *United States v. Grimaud*, 220 U.S. 506, 517 (1911)  
9 (internal quotations omitted).

10 43 U.S.C. § 1733(a), and the regulations issued under it, do not violate the separation of  
11 powers. § 1733(a) dictates that the Secretary of the Interior “shall issue regulations necessary to  
12 implement the provisions of [the Federal Land Policy and Management Act] with respect to the  
13 management, use, and protection of the public lands.” The statute, however, does not allow the  
14 Secretary to decide whether regulations promulgated pursuant to § 1733(a) are enforced via civil  
15 or criminal penalties. Instead, Congress directed that “[a]ny person who knowingly and willfully  
16 violates any such regulation which is lawfully issued pursuant to this Act shall be fined no more  
17 than \$1,000 or imprisoned no more than twelve months, or both.” *Id.* Here, Congress determined  
18 the criminal act, a knowing and willful violation of a regulation, and set the penalty for that act.  
19 The Supreme Court has “upheld delegations whereby the Executive or an independent agency  
20 defines by regulation what conduct will be criminal, so long as Congress makes the violation of  
21 regulations a criminal offense and fixes the punishment, and the regulations confine themselves  
22 within the field covered by the statute.” *Loving v. United States*, 517 U.S. 748, 768 (1996) (quoting  
23 *Grimaud*, 220 U.S. at 518). Considering that Congress has set the act and the penalties, and the  
24 regulations promulgated under § 1733(a) are limited to land under Bureau of Land Management  
25 control, the Court can find no “compelling constitutional reasons,” *Mistretta*, 488 U.S. at 384, to  
26 hold that § 1733(a) violates the separation of powers.

27 Defendant submits that, “because Congress did not work in conjunction with the Executive  
28 Branch to promulgate [the relevant] regulations,” §1733(a) requires the Secretary to do more than

1 “merely define the particulars” Docket No. 22 at 8. To support this proposition, he attempts to  
 2 differentiate *United States v. Kuok*, 671 F.3d 931, 938 (9th Cir. 2012); *United States v. Gurrola-*  
 3 *Garcia*, 547 F.2d 1075, 1078-79 (9th Cir. 1975); and *Touby v. United States*, 500 U.S. 160 (1991).  
 4 Docket No. 22 at 8. *Kuok* involved a challenge to the President’s power to define the items on the  
 5 United States Munitions List, with the unlicensed export or import of such items being criminally  
 6 prohibited. 671 F.3d at 938-39. Similarly, *Gurrola-Garcia* involved a challenge to the President’s  
 7 power to identify other arms, with the improper export or import of such items triggering criminal  
 8 sanctions. 547 F.2d at 1078-79. *Touby* involved a challenge to the Attorney General’s power to  
 9 designate certain substances to be scheduled as controlled substances. 500 U.S. at 164-69. It is  
 10 true that § 1733(a) requires the Secretary to do more than identify certain arms which cannot be  
 11 exported or certain substances which may not be possessed. That a statute requires the Executive  
 12 Branch to fill in more details than another statute, however, does not change the fact that Congress  
 13 provided criminal punishments for violating those details. Moreover, the statute at issue in  
 14 *Grimaud* required the Secretary of Agriculture to issue regulations for federal forest reserves to  
 15 “regulate their occupancy and use, and to preserve the forests thereon from destruction,” and  
 16 provided criminal penalties for violation of those regulations.<sup>4</sup> *Grimaud*, 220 U.S at 515 (quoting  
 17 30 Stat. at L. 35, chap. 2, U. S. Comp. Stat. 1901, p. 1540). Though the *Grimaud* statute is not  
 18 linguistically identical to § 1733(a), it allowed for just as broad of scope of regulations to be issued  
 19 under it as § 1733(a) currently allows. “[T]he authority to make administrative rules is not a  
 20 delegation of legislative power, nor are such rules raised from an administrative to a legislative  
 21 character because the violation thereof is punished as a public offense,” even when a statute grants

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 24 <sup>4</sup> Defendant submits that, because the *Grimaud* defendants were charged with grazing sheep  
 25 without a permit, the regulation they violated is more administrative in nature than the regulation  
 26 Defendant is accused of violating. Docket No. 28 at 3-5. Regardless of any differences between  
 27 sheep grazing and speeding, it is the fact that § 1733(a) is consistent with other statutes that have  
 28 been found to not violate the separation of powers that is dispositive. *See, e.g., Grimaud*, 220 U.S.  
 at 515-20; *Gurrola-Garcia*, 547 F.2d at 1079 (collecting cases); *United States v. Cassiagnol*, 420  
 F.2d 868, 876-77 (4th Cir. 1970) (upholding statute similar to § 1733(a) that delegated authority  
 to the General Services Administration to promulgate regulations that could trigger criminal  
 sanctions); *United States v. Moriello*, 980 F.3d 924, 932-33 (4th Cir. 2020) (same).

1 as much discretion to the Executive Branch as § 1733(a) grants. *Grimaud*, 220 U.S. at 521.

2 **IV. CONCLUSION**

3 For the reasons more fully discussed above, Defendant's motion to dismiss for violation of  
4 separation of powers is **DENIED**. Docket No. 22.

5 IT IS SO ORDERED.

6 Dated: March 24, 2023

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9 Nancy J. Koppe  
10 United States Magistrate Judge  
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